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In The
Supreme Court
of the
United States of America

January Term, 1974

No. 72-1382

F. D. RICH CO., INC.; TRANSAMERICA INSURANCE COMPANY,
Petitioner

v.

UNITED STATES OF AMERICA, for the use of INDUSTRIAL LUMBER COMPANY, INC.,
Respondent

BRIEF OF PETITIONER

PETITION FOR WRIT OF CERTIORARI FILED APRIL 13, 1973
PETITION FOR WRIT OF CERTIORARI GRANTED OCTOBER 9, 1973

OTTO ROHWER
RONALD N. PAUL
DOWNEY, BRAND, SEYMOUR & ROHWER
555 Capitol Mall, Suite 1050
Sacramento, California 95814

LAWRENCE GOCHBERG
GOCHBERG & BERKMAN
101 Broad Street
Stamford, Connecticut 06901
Attorneys for Petitioner

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES OF AMERICA:

This review is of the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 22, 1973 and reported as 473 F.2d 720. The judgment is printed in full and attached as Exhibit "A" to the Petition for a Writ of Certiorari previously filed with this Court on April 13, 1973. With reference to that judgment in this brief, petitioner will at all times refer by page reference to the judgment as printed in Exhibit "A" to the Petition for a Writ of Certiorari.

THE ISSUES

Petitioners herein, for convenience, list the issues in the sequence used by the United States Court of Appals for the Ninth Circuit with some modification of the language used by that Court:

1. Was CERPAC, the intermediary which contracted with RICH to obtain and furnish standard sheet plywood to RICH a "subcontractor" for Miller Act purposes?

2. Does the agreement of RICH, the prime contractor to deal with INDUSTRIAL, the plywood supplier, directly, rather than through the intermediary CERPAC, for the last two shipments under the contract preclude consideration of those two shipments as the "last material for which claim is made" to establish timeliness of the Miller Act notice?

3. Is venue proper in California for shipments of plywood sent directly to South Carolina by the supplier to CERPAC for use by RICH in South Carolina

with the knowledge of all parties? (This plywood arguably was originally to be supplied to the BEALE, CALIFORNIA job.)

4. Should attorneys' fees, either at the trial level or on remand from appeal, have been awarded to INDUSTRIAL for this California claim?

5. Should prejudgment interest have been awarded to INDUSTRIAL at 8%, as stated in the invoice, rather than at 7%, pursuant to California statute?

THE FACTS

Petitioner respectfully submits that although the facts as recited by the Ninth Circuit opinion are for the most part accurate, at least one inaccuracy and the need for amplification requires a complete restatement by petitioner herein as follows.

Petitioner RICH was the prime contractor for the construction of housing units at Beale AFB, California pursuant to a contract dated October 18, 1965. Petitioner TRANSAMERICA was RICH'S surety on the job and posted the required payment bond under the Miller Act, 40 U.S.C. § 270a. In February of 1966 RICH entered into a "contract agreement" with CERPAC whereby CERPAC agreed to obtain and supply quantities of exterior plywood of standard dimensions and widths. Although not directly involved in this law suit, it should also be noted that RICH awarded CERPAC a contract for all millwork to be used at Beale AFB.

From 1961 through 1968 petitioner RICH built numerous Federal housing projects, and until its bankruptcy in the Fall of 1966 CERPAC furnished much of the plywood and millwork for these projects. F. D.

RICH, JR. testified that for a period of time shareholders of the F. D. RICH CO. were shareholders in a company by the name of WINTER REALTY and that WINTER REALTY for a period of time between 1963 and probably early 1965 held up to 40% of the stock of CERPAC in a voting trust agreement. During that period of time the F. D. RICH CO. was somewhat familiar with the financial condition of CERPAC (R. T.–F. D. RICH, JR. – 5, 6, and 7). Edward Cervi, President of CERPAC, was deposed and his deposition was submitted in evidence in this action. Therein Mr. Cervi confirmed that he had acquired all of the stock in his company about a year prior to its bankruptcy, which means that he acquired it in the Fall of 1965. (Cervi depo pages 7 and 8.) Cervi's testimony substantially agrees with Rich's testimony and establishes that at the time of the February 1966 RICH-CERPAC contracts there was no interlocking relationship or any other kind of relationship between RICH and CERPAC except the contracts for millwork and plywood. The foregoing is confirmed by Finding of Fact number V.

On February 22, 1966, CERPAC placed a single order with respondent INDUSTRIAL for a specific amount of plywood which both parties probably understood was intended to be used at Beale AFB for F. D. RICH. INDUSTRIAL was what is known in the trade as a "desk wholesaler" and it in turn obtained orders for the plywood from two supply sources which happened to be Diamond National and Clear Fir. The CERPAC-INDUSTRIAL designation for these orders was "Beale 647". The shipments to RICH at Beale

began on approximately March 10, 1966, and were invoiced as shown in Finding of Fact number XIX.

The plywood covered by INDUSTRIAL invoices E-280 and E-281 was not sent to Beale AFB but rather were sent by railroad car to another RICH project at Charleston, South Carolina. (Petitioner TRANSAMERICA was not the surety on that job.) Mr. Fowler, INDUSTRIAL'S witness, testified that the plywood covered by these two invoices was loaded onto a railroad car at *the mill* supplying the lumber to INDUSTRIAL and sent to the freight station at INNESS, SOUTH CAROLINA with the knowledge and blessings of INDUSTRIAL. (R. T. 45-46) INDUSTRIAL negotiated change orders with CERPAC regarding these shipments although they apparently retained the "Beale 647" designation. Note that this all transpired in March of 1966.

In April (R. T. page 47) or May R. T. page 74) of 1966 INDUSTRIAL adviser CERPAC that it would do no more business on open-account with CERPAC because it had not been paid by CERPAC for certain shipments (Cervi testified in his deposition that he had in fact been paid by RICH for all of the materials being supplied by INDUSTRIAL before this time– (Cervi's depo. page 68). Thereafter, RICH agreed to be billed directly for orders E-284 and E-285 bearing invoice dates of June 10th and June 28th, 1966 respectively and the plywood was shipped to Beale AFB and invoiced directly to F. D. RICH. At trial RICH admitted a direct contract with INDUSTRIAL for the last two invoices which totaled $6,976.33. These last two ship-

ments arrived at Beale on May 16th and June 23rd, 1966.

The parties stipulated at trial that the only Miller Act notice sent to RICH was dated July 13, 1966 and received by RICH on July 15, 1966 (R.T. page 17).

The trial court found in favor of INDUSTRIAL for the entire $31,402.97 calculated in Finding XIX. The voluminous findings of the District Court are a part of the record on this appeal. The decision of the Ninth Circuit affirmed the trial court in all particulars except that it ruled that the amount due was liquidated and therefore should bear interest at the rate of 8% as opposed to the 7% awarded by the District Court and the Ninth Circuit also for the first time ruled that attorney fees would be recoverable in this Miller Act suit brought in California. The court remanded for consideration by the District Court the amount of the attorney fees and also for consideration of the question as to whether it wished to award attorney fees for work on appeal.

After hearing, on April 16, 1973, the District Court awarded judgment in the total amount of $66,999.59 against F. D. RICH CO., and a lesser amount against TRANSAMERICA. Although the judgment does not specifically so designate, the parties to this review will stipulate that said figure includes a 25% of the recovery attorney fee for work done through the trial level and an additional $3500 fee awarded for work on appeal, all pursuant to the District Court finding on April 16, 1973.

The April 16, 1973, judgment by the District Court is found in Exhibit "1" to this brief.

WAS CERPAC A SUBCONTRACTOR?

The law is well settled that if CERPAC was merely a supplier or materialman within the meaning of the Miller Act, then INDUSTRIAL would have had no Miller Act rights against RICH since it would simply have been a supplier to a supplier *(See Aetna Cas. and Sur. Co.* v. *Gibson Steel Co.* 382 F. 2d 615: *Clifford F. Macevoy Co.* v. *United States* 322 U.S. 102; *Brown & Root Inc.* v. *Gifford Hill* 319 F. 2d 65 for examples).

The decisions give us no definitive definition of the difference between a materialman and a subcontractor. Petitioner submits that the test apparently applied by the Ninth Circuit, namely – "The distinction between subcontractors and materialman turns on the subtantiality and importance of the relation between the middle party and the prime contractor." – is not helpful in this already litigation prone construction field and ought not be accepted. This approach will in most, if not all, circumstances require a law suit. We respectfully submit that a more workable approach is that suggested in the *United States for the use of Harold Bryant* v. *Lembke Construction Co.* 370 F. 2d 293. Therein the court ruled that a supplier who furnished concrete to the prime contractor was merely a materialman and not a subcontractor even though he agreed to supply all of the concrete necessary for the government construction job. The language of the court is significant–"In this case Adams undertook to furnish concrete. There was by this undertaking no substantial delegation of any portion of Lembke's contract. The concrete Adams undertook to deliver was in no way a "custom-

ized" material thus bringing Adams within the purview of those cases holding that a supplier of such "customized" material is a subcontractor, even though he does not perform many services in reference to installation. All Adams did was deliver concrete. Admittedly, he was to deliver all the concrete needed for the job and the concrete had to conform to the specifications in the prime contract. This does not however change Adams' status from a materialman to a subcontractor. The reference in Adams' contract to the specifications in the prime contract is "merely descriptive of what is to be furnished" (citing cases) *(Lembke* 370 F. 2d 293 at 295-296).

The Lembke test is something that can be understood in the trade. The materialman's contract usually of necessity, and for convenience, refers to the master or prime contract even as CERPAC's did here. The plywood furnished by INDUSTRIAL to CERPAC was a standard item that was in no way "customized". In fact, the plywood was so standard that it was not even seen by either CERPAC or INDUSTRIAL but was merely ordered by INDUSTRIAL by telephone from standard plywood suppliers, eg. Diamond National and Clear Fir (R.T. pages 23-28). The Circuit Court opinion seeks to tie in the millwork contract between RICH and CERPAC, a contract with which INDUSTRIAL had no dealings whatsoever. Furthermore, the millwork contract was merely introduced into evidence and there was no testimony as to its requirements (R.T. 15, Exhibit #4). Accordingly, there is actually no testimony before the court as to whether the millwork called for customized work or non-customized work.

We repeat that the construction industry ought to be favored with a legal approach which can be readily applied and understood. Contrary to the suggestion of the Circuit Court that CERPAC was not an ordinary materialman but was in a " . . . special, integral, almost symbiotic relationship to RICH . . . ", the situation was actually a typical one of a materialman supplying a portion of the prime contractor's requirements. We have already outlined the testimony indicating that there was no special relationship between the two as of the time this contract was signed, and thereafter.

RICH concedes now as it did at trial that it is liable for the last two shipments of plywood on a direct contract theory. However, since CERPAC was and should have been determined to be a materialman as a matter of law, petitioner suggests that it follows that the remainder of INDUSTRIAL'S claim which was based upon a Miller Act cause of action should have been denied.

THE MILLER ACT NOTICE WAS NOT TIMELY

The Act provides that within 90 days of the last furnishing of materials, those who have furnished supplies to subcontractors and who have no contractual relationship to the prime contractor must notify the prime contractor of their materialman's claims. *40 U.S. Code Annotated § 270b(a)*. The notice provision is a matter of substance, and the decisions infer that it should be literally applied. It may be as arbitrary a rule as that defining a statute of limitations in a negligence action but it has at least an equivalent philosophical backing.

"Certainly Congress intended by passing the Miller Act to afford subcontractors and materialman, no doubt in substitution for the mechanic's lien generally available against private property owners, a liberal remedy against the general contractor. But, the provision for notice indicates that Congress did not intend to strip the prime contractor, who is primarily liable, of all protection. The notice provision permits the prime contractor, after waiting 90 days, safely to pay his subcontractors without fear of additional liability to subcontractors or materialman. *(U.S. for the use of Monroe-Langstroth* v. *Praught* 270 F. 2d 235, at 237, 238). It has also been said that " . . . once 90 days have elapsed without such notice, the contractor ought to be free to pay the subcontractor for his work without risk of liability to the supplier. A less strict interpretation of the notice proviso "would lead either to double payments or to interminable delay in settlements between contractors and subcontractors to guard against these – in either case with attendant prejudice to all concerned". (citing cases) *(United States for the use of I. Burack, Inc.* v. *Sovereign Construction Co., Ltd.* 338 F. Supp. 657 at 661).

An examination of the recapitulation shown in finding number XIX illustrates that if the last two shipments of plywood (E-284 and E-285) which were invoiced directly to F. D. RICH are excluded, the next preceding shipment E-283, which bears an invoice date of April 8, 1966 covering materials actually received at the job site on April 1, 1966 (Exhibit 3 page 35) is clearly more than 90 days prior to the July 15th Miller Act notice.

The Circuit Court handled the matter rather summarily and indicated that since *CERPAC* and *INDUSTRIAL* had labeled the last two shipments "Beale 647" and they were furnished to RICH at Beale, the admitted fact that the last two shipments were a matter of direct contract between RICH and INDUSTRIAL was inconsequential. (We are not really told why it was inconsequential.) In fact, we respectfully submit that the consequences of this ruling are quite severe. In the first place the Circuit Court's approach means that the prime contractor deals with a former supplier to one of his materialman or subcontractors at his peril. His independent direct contract may revive otherwise expired Miller Act claims, which is exactly what the Circuit Court ruled happened here. This conclusion was rejected in *United States for the use and benefit of Harris Paint Co.* v. *Seaboard Surety Co.* 437 F. 2d 37. Therein the facts were similar to those now before us and the Circuit Court affirmed the granting of a summary judgment for defendant indicating: "Plaintiff stands or falls on one proposition—whether the purchase and use by a contractor of materials from a supplier in the completion of a subcontractors job, without more, extends the time for giving the notice under the Miller Act by the supplier until 90 days after the last of such material is furnished to the contractor. And on that proposition, plaintiff fails." *(437 F. 2d 37 at page 38)*. The court further indicated ". . . that it was the intent of Congress to fix a time limit after which the prime contractor could make payment to the subcontractor with certainty that he would not thereafter be faced by claims of those who had supplied labor and

materials to the subcontractor. It is not consistent with either this intent or the mechanics of the statute if a prime contractor is required to choose between withholding payment to his subcontractors indefinitely or acting at his peril. . ." *(437 F. 2d 37 at 39).*

Again looking to the practicality of the matter it is very clear that INDUSTRIAL and RICH understood that they were embarking on an entirely new relationship with the direct contract for invoices E-284 and E-285 as well as for the Door contracts which were paid directly. Mr. Fowler, a salesman for INDUSTRIAL, indicated that he called CERPAC in approximately April of 1966 and told CERPAC that INDUSTRIAL would not ship any more materials until it had been paid by CERPAC for past shipments (R.T. page 47). Mr. Van Baest, and officer, director and comptroller of INDUSTRIAL, indicated that he talked with CERPAC toward the end of May of 1966 and said there would be no more dealings with CERPAC on an open account (R.T. pages 71 through 74). In fact, INDUSTRIAL took a note from CERAC dated May 24, 1966 for the amount due from CERPAC to INDUSTRIAL (R.T. page 82). Invoices E-284 and E-285 hadn't even been prepared at that time (R.T. page 84), then, of course, the plywood, contrary to past practices, was invoiced directly to the F. D. RICH CO. As further evidence of this entirely new relationship Mr. Van Baest testified that although they had charged CERPAC $82.00 per thousand square feet for the plywood, they charged RICH $84.50 per thousand feet, for the two invoices sent in June. Mr. Van Baest stated that the $2.50 difference—per thousand square feet—was to

be paid to CERPAC as a commission (R.T. page 76). They had not previously paid CERPAC a commission but Mr. Van Baest explained, "... we pay our commission man what we receive, the money from our *customers.*" (Emphasis added–R.T. page 77).

Petitioner can find no authority permitting such a new direct contractural relationship with the materialman for supply of materials at a different price than he had been supplying them to his contract, and with a difference in commission arrangement, to serve as a basis for exposing the prime contractor to otherwise stale Miller Act type lien claims. Appellant suggests that the decisions cited earlier in the discussion of this point are to the contrary and suggest a better rule. *See also U.S. for the use of J. A. Edwards & Company, Inc.* v. *Peter Reiss Construction Co.* 237 F. 2d 880.

Section 270b of the so-called Miller Act in fact recognizes two entirely different relationships, one wherein the materialman has a direct contract with the prime contractor and one wherein he does not. There is nothing in the statute suggesting that the two should be run together so that a direct contract revives an otherwise stale Miller Act claim. Indeed there would be very little reason for the distinction in the statute if that were the intent.

We respectfully suggest that the *Harris* rule is the most workable and represents the intent of Congress.

VENUE–THE SOUTH CAROLINA SHIPMENT

The materials shipped to Inness, South Carolina in March of 1966 pursuant to invoices E-280 and E-281 were sent there with the full knowledge, consent, and

actually at the direction of INDUSTRIAL which asked the mill, its supplier, to load the plywood on a railroad car headed for Inness, South Carolina. (R.T.-26.) The materials were utilized on a government project in South Carolina. The bonding company was not petitioner TRANSAMERICA herein. While the case law lays down the caveat that the material need not be actually used on the job site intended it does flatly state that the supplier must "in good faith and under reasonable belief" believe that the material was intended for ultimate use under the contract for which the bond attaches *(Westinghouse Electric Supply Co.* v. *Endebrock-White Co.* 275 F. 2d 57; *McDermott* v. *Woods Construction Co. 224 F. Supp. 406;* and *U.S. for use of Pomona Tile Manufacturing Co.* v. *Kelly* 456 F. 2d 148). In this instance INDUSTRIAL, before the plywood in question was shipped, knew as a fact that it was intended for use and would be used in Inness, South Carolina (not Beale AFB). Indeed INDUSTRIAL filed action number 67-151 in the District Court of the United States for the District of South Carolina, Charleston Division claiming the $6,808.32 representing invoices E-280 and E-281. That action was off calendar at the time the instant action was tried but it does show that plaintiff INDUSTRIAL itself believed that Charleston was the proper jurisdictional basis for its suit (See discussion regarding this matter R.T. pages 9 and 10).

RICH and TRANSAMERICA preserved the issue in their pretrial statement and moved for dismissal of the Inness portion of the suit from this action at the beginning of the trial. That motion was denied (R.T.

page 10) and the Circuit Court decision upholds that denial.

40 U.S.C.A. § 270 states in part that every suit instituted under this Section shall be brought ". . . in the United States District Court for any district in which the contract was to be performed and executed *and not elsewhere. . .*" (Emphasis added). *In U.S. for the use of Vermont Marble Co.* v. *Roscoe-Ajax Construction Co.* 249 F. Supp. 439 and in *U.S.* v. *Rondout Marine, Inc.* 312 F. Supp. 846 the courts interpreted this statute as more than a so-called venue requirement and in fact stated that it was mandatory and jurisdictional.

In *Rondout* the court reasoned that . . . since such suits sometimes involve disputes as to performance, the venue requirement facilitates the subpoenaing of essential witness who participated in the work at the contract site" *(See also U.S. for use and benefit of Capolino Sons.* v. *Electronic & Missile Facilities, Inc.*, 364 F. 2d 705, 707).

The Circuit Court opinion sems to discount all of the foregoing simply because the plywood was ordered, strictly as a matter between CERPAC, INDUSTRIAL and its supplier, for the Beale 647 contract. We submit that it makes no particular difference where the material was originally intended to go. The testimony clearly indicates that before the materials were even loaded all the parties agreed to ship the material for us in South Carolina. *That was the contract destination.*

We respectfully submit that the District Court, Charleston Division, was and is the only proper place for the trial of INDUSTRIAL'S law suit with regard to the two invoices shipped to Inness.

ATTORNEYS' FEES

The Circuit Court correctly noted that the Miller Act does not speak to the question whether prevailing parties may recover attorneys' fees as additional damages or costs, nor is there legislative history on the issue. The Circuit Court favored the philosophy enunciated in *Transamerica Insurance Co.* v. *Red Top Metal, Inc.* 384 F. 2d 752. Therein, as noted by the Circuit Court, the Federal court looked to state policy and specifically looked to see if state law allowed a supplier on 'private projects' to recover attorneys' fees. Petitioner submits that this philosophy is peculiar in that the court seems to be merging an *Erie* v. *Tompkins* philosophy with the precise words of a Federal statute. Legally this is a peculiar marriage. This is not an *Erie* v. *Tompkins* situation. The rights flow only from a Federal statute.

Some other courts have agreed with the *Red Top* philosophy and others have completely disagreed. It has been held by some courts that State law cannot be incorporated into Federal law; that State law cannot determine the question of recovery of attorneys' fees in Miller Act litigation and thus the correlary has been created that, the Miller Act being silent regarding attorneys' fees, attorneys' fees are not recoverable in Miller Act litigation. *See United States for the use of Getz Bros. & Co.* v. *Markowitz Bros.* 383 F. 2d 595; *United States for the use of E. J. Bartells Co.* v. *Hoffman Construction Co.* 163 F. Supp. 296; *United States for the use of Eoff Electric Co.* v. *Mann* 196 F. Supp. 185.)

This court in *Fleischmann* v. *Maier Brewing Co.* 386 U.S. 714 18 L ed. 2d page 475 has recently stated, rather

clearly we thought, the general rule that ". . . attorney fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefore." (at page 478). Several minor exceptions to this principle were enunciated but the Miller Act was not one of them. The court therein seemed to be saying, quite clearly, that Congress knows how to provide for the recovery of attorneys' fees in a statute if it so chooses—it had not so chosen—and therefore the courts would not judicially legislate. We submit that this makes eminent good sense in that throughout the Federal statutory system and indeed the statutory systems of most if not all States, the general rule is that attorneys' fees are not recoverable and conversely a statute allowing recovery is the exception. Historically, petitioner knows of few examples of judicial erosion of this precept.

California law states the general rule that attorneys' fees are not recoverable in the absence of a contractual agreement or a very special statute *(Reid* v. *Valley Restaurants, Inc.* 48 Cal. 2d 606, 610). Similarly attorneys' fees are not recoverable as costs except where expressly allowed by statute (and there are few examples) *(Stockton Theaters Inc.* v. *Palermo,* 124 Cal. App 2d 353, and *LaMesa-Springs Valley School District* v. *Otsuka,* 57 Cal.2d 309).

It is true that *California Government Code* Section 4207, in effect at the time of the contract here and at the time of the trial, provided for recovery of attorneys' fees in State actions on the bond of public work contractors for State and local government authorized jobs. This section had no application to private jobs and, of course, as noted in the circuit court opinion the State

Court of Appeals, Third District, ruled that the statute had no application to private construction projects or to projects of the United States (*B. C. Richter Construction Co.* v. *Continental Casualty Co.*, 230 Cal. App. 2d 491, 506). The Circuit Court herein not only disagreed with and ruled contrary to the interpretation of the California Government Code given by California's own Appellate Court but also created as a matter of first impression some new law when it suggested to the District Court that, on remand, attorneys' fees for work on appeal could be awarded. As stated previously, the District Court judge did on April 16, 1973 enter his order allowing $3500 to INDUSTRIAL as attorneys' fees for its work on the appeal. The $3500 figure is included in the total judgment filed on April 16, 1973.

However, as a general rule in California, attorneys' fees are not allowed for work on appeal and accordingly, if the Federal Court was purporting to look to State law (the decision really does not say what the basis for the suggestion is) it seems that the court created something new. *California Code of Civil Procedure*, Section 1034 governs costs on appeal. Attorneys' fees are not therein mentioned and accordingly are not recoverable. The California Supreme Court has previously denied attorneys' fees on appeal when presented as a "necessary disbursement" (*Moss* v. *Underwriters Report Inc.*, 12 Cal. 2d 274).

Petitioner suggests that Congress has had ample opportunity to amend the Miller Act to include attorneys' fees if it was Congress' intent. The decisions have been in conflict and petitioner respectfully suggests that

this court indicate herein that it meant exactly what it said in the *Fleischmann* case. Attorneys' fees in Miller Act cases should not be recoverable until or unless the Federal statute is amended to so provide.

INTEREST

The Circuit Court decided that each element of damages was specified by invoice and thus was at least reasonably calculable within the meaning of the California statute. (Cal. Civil Code 3287 and 3289). However, we submit that the matter is not so clear. INDUSTRIAL during trial acknowledged a credit due to CERPAC in the amount of $1,667.95. It chose arbitrarily to deduct that credit from the Inness invoices (See R.T. pages 7, 8, and 29). There was an issue during trial as to whether that credit should be deducted from the Inness invoices or from some of the other invoices. There was also the question, of course, as to whether the Inness invoices should be considered at all. Since we are today still contending and we believe rightly so, that the matter of whether anything at all is owed on the Inness invoices should be litigated in South Carolina and the question remains whether the credit should be applied in that law suit, in this law suit, or wherever, petitioners argue that the amount was hardly liquidated or calculable.

Accordingly, we submit that the District Court's decision to, in its discretion, award 7% interest for an unliquidated amount under California Civil Code Section 3287(b) was not only reasonable but proper.

CONCLUSION

Petitioners earnestly submit that the questions presented herein are of great importance to the construction industry in general, an industry fraught with litigation. The rules of reason and law suggested by petitioner herein are of a practical nature and, if adopted, would tend to eliminate an important measure of uncertainty in the application of the Miller Act. Regarding the attorneys' fees issue specifically, we submit that your judicial pronouncements have been clear that the statute does not authorize recovery and of course any amendment to the philosophy is for the legislature.

Petitioner submits that RICH and TRANSAMERICA are liable only for the sum of $6,976.33 representing the amount due for materials supplied pursuant to direct contract with INDUSTRIAL as aforementioned together with applicable interest to date of satisfaction of judgment. The matter of the shipments to Inness, South Carolina should be disposed of in the pending action filed there by INDUSTRIAL.

DATED: November 15, 1973.

Respectfully submitted,

Law Offices Of:
DOWNEY, BRAND, SEYMOUR & ROHWER

By
OTTO ROHWER

By
RONALD N. PAUL

and

Law Offices Of:
GOCHBERG and BERKMAN

By
LAWRENCE GOCHBERG
Attorneys for Petitioner

CERTIFICATION

I certify that in connection with the preparation of this brief I have examined all applicable Federal rules of appellate procedure and that in my opinion the foregoing brief is in compliance with those rules.

OTTO ROHWER

RONALD N. PAUL

LAWRENCE COCHBERG